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No. 06-394

In the Supreme Court of the United States

SUZANNE FLIGIEL, PETITIONER

v.

JIM NICHOLSON, SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed a district court's denial of a claim that a physician employed by the Department of Veterans Affairs was transferred to another Department facility without adequate notice and an opportunity to respond as guaranteed by 38 U.S.C. 7463.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 3a-17a) is reported at 440 F.3d 747. The initial opinion of the court of appeals (Pet. App. 18a-32a) is reported at 428 F.3d 621. The January 31, 2001, order of the district court granting the motion to dismiss petitioner's complaint (Pet. App. 58a-69a), the February 10, 2004, order of the district court denying the motion to alter or amend (Pet. App. 33a-39a), and the August 26, 2003, decision of the district court denying reconsideration under Federal Rule of Civil Procedure 54 (Pet. App. 40a-51a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2006. A petition for rehearing was denied on June 16, 2006 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was appointed as a physician in the Veterans Health Administration within the Department of Veterans Affairs (DVA). DVA physicians are excepted from competitive service and thus not covered by the Civil Service Reform Act of 1978 (CSRA). 5 U.S.C. 2102(a)(1)(A), 2103, 4303, 7511(b)(10); 38 U.S.C. 7403(a)(1) and (2). Adverse actions against DVA physicians are governed by 38 U.S.C. 7461-7463.

Section 7461 creates two routes for administrative disciplinary proceedings for physicians. In cases involving "a question of professional conduct or competence in which a major adverse action was taken," including a transfer, administrative appeals are taken to a Disciplinary Appeals Board (DAB). 38 U.S.C. 7461(b)(1), (c)(2). A case involves "a question of professional conduct or competence" if there is "a question" involving "[d]irect patient care" or "[c]linical competence." 38 U.S.C. 7461(c)(3)(A)-(B). A DAB decision is reviewed by the Secretary of the DVA. 38 U.S.C. 7462(d). The decision of the Secretary is subject to judicial review under Section 7462(f), which authorizes the reviewing court to set aside the Secretary's decision. 38 U.S.C. 7462(f)(2)(A)-(C).

In all other cases in which an adverse personnel action is either "(1) is not a major adverse action; or (2) does not arise out of a question of professional conduct or compe-

tence," the aggrieved physician may invoke the grievance procedures set forth in 38 U.S.C. 7463. 38 U.S.C. 7463(a)(1)-(2). Section 7463 provides that the DAB does not have jurisdiction over such a case. 38 U.S.C. 7463(a). Rather, Section 7463 provides for a right to a hearing before an impartial hearing examiner with the right of subsequent review before "an official of a higher level than the official who decided upon the action." 38 U.S.C. 7463(d)(3). Unlike Section 7462, Section 7463 does not provide for any right of further review by a court.

2. Petitioner filed suit in June 2000 against the Department, the Secretary of the Department, and her immediate supervisor, alleging that the Department in October 1999 had violated her statutory due process rights under 28 U.S.C. 7461-7664 and her constitutional due process rights. Pet. App. 59a-60a. Those allegations arose from the decision of her supervisor, Michael K. Samson, to remove petitioner from her position as Chief of Pathology and Laboratory Medical Services at the John D. Dingell VA Medical Center in Detroit, Michigan, and to reassign petitioner to the Ann Arbor VA Medical Center, in Ann Arbor Michigan, as a staff pathologist. *Id.* at 60a. Petitioner's demand for a DAB hearing under 38 U.S.C. 7462 was denied. Pet. App. 60a. Four months later, petitioner amended her complaint to allege that her transfer constituted unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 34a.

In an order dated January 31, 2001, the district court granted summary judgment for the government and dismissed petitioner's constitutional and statutory claims, holding that the reassignment was unrelated to her professional competence or conduct within the meaning of 38 U.S.C. 7462, and was not a major adverse action within

the meaning of Section 7463 because petitioner did not suffer any reduction in salary or rank and was not disciplinary in nature. Pet. App. 64a-65a, 69a. The court thus rejected petitioner's argument that she was entitled to the notice and hearing procedures applicable to charges under Section 7463. *Id.* at 65a n.6.

On May 22, 2002, petitioner filed a second amended complaint adding a Title VII claim of retaliation against defendants. Pet. App. 35a. On October 21, 2002, the district court granted petitioner's motion to file a third amended complaint alleging that in October 2001, defendants had permanently reassigned petitioner from her "detail" position in Ann Arbor, Michigan as the Chief of Pathology to a staff position in Saginaw, Michigan in violation of her statutory due process rights accorded by 38 U.S.C. 7461-7464. Pet. App. 54a-57a. Petitioner's Title VII claims were then tried to a jury, which returned a verdict in favor of the government. *Id.* at 35a, 52a-53a.

Petitioner sought reconsideration of the court's rejection of her statutory due process claim, in light of the evidence developed subsequent to the court's dismissal of the claim. In an order dated August 26, 2003, the district court denied that motion. Pet. App. 40a. In so holding, the district court reversed its prior holding that the transfer of petitioner was not a major adverse action within the meaning of 38 U.S.C. 7461(c)(2). The court concluded that the transfer was indeed a major adverse action based on the court's finding that petitioner's original detail was a pretext for disciplinary action. Pet. App. 46a. The court also found that the transfer was not based on petitioner's professional conduct or competence and that, therefore, petitioner had no right to the procedures accorded by Section 7462. *Id.* at 46a-47a.

Because the court found that petitioner had suffered a major adverse action not governed by Section 7462, the court concluded that petitioner's employment action was governed by Section 7463 and accordingly that petitioner should have been accorded the procedures for notice and opportunity for a hearing set forth in Section 7463. Pet. App. 47a, 49a. The court rejected the government's contention that the court lacked jurisdiction to review that claim under *United States* v. *Fausto*, 484 U.S. 439 (1988), as applied in *Pathak* v. *Department of Veterans Affairs*, 274 F.3d 28 (1st Cir. 2001). The court observed that *Pathak* had applied *Fausto* to hold that the DVA physician in that case did not have any right to judicial review from the results of a disciplinary action governed by Section 7463 because Congress had intentionally omitted any right to judicial review in direct contrast to the judicial review expressly allowed in employment actions governed by Section 7462. Pet. App. 48a. The court explained that *Pathak* was inapposite here because petitioner had not been accorded the procedures otherwise mandated by Section 7463, where as in *Pathak*, the DVA physician had been disciplined only after receiving all procedures mandated by Section 7463. *Id.* at 48a-49a.

The court rejected, however, petitioner's demand for reinstatement as a remedy for the Department's procedural violation, holding that the DVA's failure to provide petitioner with the Section 7463 procedures was harmless error. Pet. App. 49a-50a. The court explained that "the record of this case and the testimony at trial provided overwhelming evidence that [petitioner] was transferred and later reassigned because she either refused or was unable to perform the administrative and supervisory tasks of her position as Chief in a satisfactory manner." *Id.* at 50a. The court concluded that even had the DVA accorded

petitioner with the procedures required by Section 7463, "there is absolutely no indication or suggestion in this record that the [Department] would have modified its original decision to place her in some VA facility other than Detroit." *Ibid.* The court thus denied petitioner's request to set aside the court's January 31, 2001, order in which summary judgment was granted on the statutory due process claim. *Id.* at 51a.

3. The court of appeals affirmed. Pet App. 3a-17a. In the court's initial decision issued November 10, 2005, the court found it unnecessary to address petitioner's claim that the district court had erred in applying the doctrine of harmless error, holding that this district court lacked subject matter jurisdiction under *Fausto*. Pet. App. 23a. The court of appeals agreed with the trial court that petitioner's transfer "was a major adverse action" subject to Section 7463 and further explained that there was no right of judicial review from any decision rendered under Section 7463. *Ibid.* The court also found that the absence of judicial review from an adverse employment action governed by Section 7463 reflected Congress's intent to foreclose judicial review of petitioner's claim that she was denied the procedures mandated by Section 7463. *Id.* at 13a, 26a-32a.

The court of appeals issued an amended opinion on March 7, 2006. Pet. App. 3a-17a. That opinion was identical to the court's earlier opinion with the exception that the court of appeals added a new footnote five. In the footnote, the court observed that "[o]n appeal, [petitioner] challenged the denial of *statutory* due process. Therefore, we do not reach the issue of whether the preclusion of review extends to due process claims based on the United States Constitution." *Id.* at 17a n.5.

ARGUMENT

The court of appeals correctly held that any challenge to the merits of petitioner's transfers by the Department was barred by this Court's decision in *Fausto*. That holding is likewise in accord with the First Circuit's decision in *Pathak*. There is no conflict in the circuits with respect to that question, and petitioner claims none in her petition. While petitioner was erroneously denied the benefit of the Section 7463 procedures, that does not necessarily confer jurisdiction under the rule of *Fausto*. In any event, any such error was harmless on the unique facts presented in this case. The court of appeals' decision thus does not warrant this Court's review.

1. In *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court held that an excepted service federal employee, for whom the CSRA did not then provide a right of review before the Merit System Protection Board or a court, could not obtain judicial review of an adverse personnel action under the Tucker Act or the Back Pay Act. The Court held that such an exclusion "displays a clear congressional intent to deny the excluded employees the protections of Chapter 75—including judicial review—for personnel action covered by that chapter." *Id.* at 447.

The principles recognized in *Fausto* have been extended beyond the Tucker Act and the Back Pay Act at issue in *Fausto* to include virtually every other type of suit by a federal employee seeking to challenge administrative disciplinary actions. *Mann* v. *Haigh*, 120 F.3d 34, 37-38 (4th Cir. 1997); *Ryon* v. *O'Neill*, 894 F.2d 199, 200 (6th Cir. 1990); *Stephens* v. *Department of Health & Human Servs.*, 901 F.2d 1571, 1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); *McAuliffe* v. *Rice*, 966 F.2d 979, 980 (5th Cir. 1992). There is no dispute in this case that petitioner

is an excepted service employee and thus excluded from the protections generally accorded federal employees under the CSRA. See p. 2, *supra*.

There is also no dispute that adverse actions against petitioner are governed by 38 U.S.C. 7461-7463. Section 7461 creates two routes for administrative disciplinary proceedings. In cases involving "a question of professional conduct or competence in which a major adverse action was taken," administrative appeals are reviewed by a DAB, whose decision is reviewed by the Secretary. 38 U.S.C. 7401(a), 7462(d). The Secretary's decision is expressly subject to judicial review. 38 U.S.C. 7462(f)(2). The district court held that this case did not present a question of professional conduct or competence under Section 7462. Pet. App. 46a-47a. The court of appeals accepted that ruling, *id.* at 25a, and petitioner does not contest that issue in this Court.

Because petitioner suffered a major adverse action that did not involve a question of professional conduct or competence, petitioner was subject to the grievance procedures set forth in Section 7463. As noted above, Section 7463 provides for a right to a hearing before an impartial hearing examiner with the right of review before "an official of a higher level than the official who decided upon the action." 38 U.S.C. 7463(d)(3). However, unlike Section 7462, Section 7463 does not provide for any right of judicial review. The district court held that petitioner should have been accorded these Section 7463 procedures and the court of appeals likewise accepted that ruling. Pet. App. 25a.

Congress's inclusion of an express avenue for judicial review under Section 7462 and the total absence of any such authorization for judicial review in Section 7463 reflects Congress's deliberate choice to preclude judicial

review following the administrative proceedings conducted under Section 7463. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Indeed, Section 7463 makes clear that Congress knew how to incorporate the remedies provided under 7462. Thus, Section 7463(c)(1) provides that if charges brought against a physician "could result in a major adverse action and which do not involve professional conduct or competence, the employee is entitled to the same notice and opportunity to answer * * * provided in subparagraphs (A) and (B) of section 7462(b)(1) of this title." That incorporated Section addresses only the procedures to be used in the initial administrative proceedings. The right of judicial review under Section 7462(f) is, in contrast, specifically limited to review of decisions of the Secretary and the DAB under Section 7462(d). It would have been a simple matter for Congress to cross-reference Section 7462(f) had Congress intended to provide such judicial review under Section 7463.

Based on the above statutory scheme, the First Circuit in *Pathak* held that the absence of judicial review from Section 7463 proceedings was "persuasive evidence that Congress deliberately intended to foreclose further review of such claims." 274 F.3d at 32 (quoting *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982)). As the *Pathak* court explained, "these statutory provisions generally offer the Secretary greater discretion in employment-related decisions (e.g., hiring) regarding [DVA physicians] than he would have over other civil servants." *Ibid.* The First Circuit thus correctly concluded that because neither the

CSRA nor Section 7463 provides for judicial review, DVA physicians "may not rely on the Administrative Procedure Act as an independent source of review." *Id.* at 32-33).*

2. Petitioner does not contend that *Pathak* was wrongly decided. Rather, petitioner contends only that *Pathak* is inapplicable here because the VA physician in *Pathak* had been accorded all the procedures mandated by Section 7463 while petitioner in this case was erroneously accorded none of this procedures with respect to the transfers and reassignments she challenged. Pet. 11. But the availability of jurisdiction does not depend on the procedures that the claimant allegedly received. In any event, regardless of its impact on the jurisdictional determination, the allegedly erroneous denial of the procedural protections accorded by Section 7463, however, does not warrant plenary review by this Court.

As noted, the district court held that the transfers and reassignments of petitioner were "major adverse action[s]." Pet. App. 46a. The court of appeals did not disturb that ruling. *Id.* at 13a, 25a. The procedures specified by Section 7463 therefore should have been provided. Petitioner did not bring suit, however, merely to obtain the Section 7463 procedures. Rather, petitioner seeks a judicial order of reinstatement to her former position as a supervisor "at the Detroit VA." *Id.* at 49a. As court of appeals properly

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* The court in *Pathak* further found that it need not consider the plaintiff's due process constitutional claim because it was "not even colorable" on the facts of that case. 274 F.3d at 33. The court of appeals in this case similarly was not confronted with any constitutional claim as petitioner challenged on appeal only "the denial of *statutory* due process." Pet. App. 17a n.5. Petitioner likewise does not raise any constitutional claim in her petition. This case thus does not present any preclusion of constitutional claims at issue in *Whitman* v. *Department of Transp.*, 126 S. Ct. 2014 (2006).

held, that sort of relief is barred by *Fausto* as applied in *Pathak*, because there is no judicial review of the merits of the VA's decision to discipline petitioner with respect to the transfers, even if the procedures of Section 7463 had been followed and the agency determined that the employment actions were proper.

Even assuming that petitioner was entitled to bring suit under the Administrative Procedure Act, 5 U.S.C. 706(2)(D), not to seek reinstatement but to compel the "observance of procedure required by law," petitioner would not be entitled to relief on the record here. In conducting that review, the APA provides that the reviewing court must also take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706. Similarly, a reviewing court will not order a remand to the agency where such a "remand would be an idle and useless formality." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion). Courts are thus not required to "convert judicial review of agency action into a ping-pong game." *Ibid.*

The district court correctly applied the rule of harmless error in this case, holding that "the Secretary's failure to provide the [Section 7463] due process protections, to which [petitioner] was entitled, was a harmless error." Pet. App. 49a. Based on the district court's independent review of the record and the jury's verdict in the Title VII proceeding, the district court was convinced that petitioner was transferred and reassigned "because she either refused or was unable to perform the administrative and supervisory tasks of her position as Chief in a satisfactory manner." *Id.* at 50a. As the trial court found, the jury rejected the very claims on the merits that petitioner would raise in any Section 7463 proceeding. *Ibid.* ("During the trial [petitioner] complained that the decision to transfer

her was, at least in part, motivated by her gender. The jury thought otherwise and returned a verdict in favor of the Secretary, which further confirms * * * that her transfer was prompted by her deficiencies as an administrator and supervisor."). The trial court thus properly found that even if petitioner had been given all the Section 7463 procedural protections, "there is absolutely no indication or suggestion in this record that the [Veterans Health Agency] would have modified its original decision to place her in some VA facility other than Detroit." *Ibid.*

As explained above, an agency's discipline of a VA physician after exhaustion of the Section 7463 procedures is not subject to judicial review, a principle that petitioner does not contest. If there is no judicial review of the merits of the agency's disciplinary decision and if, as here, it is apparent that the agency would have reached the same decision even after according the Section 7463 procedures, there is no basis for a reviewing court to reinstate petitioner to a position pending completion of those procedures, the relief demanded by petitioner. A remand to comply with Section 7463 would be "an idle and useless formality." *Wyman-Gordon Co.*, 394 U.S. at 766 n.6.

Those reasons likewise counsel against this Court's plenary review. The most petitioner could ever obtain is a remand for the agency to follow Section 7463 procedures with any ultimate agency decision not subject to review. Such a remand would be unique to this case and does not involve any important or recurring issue of law. Indeed, the agency's failure to follow Section 7463 procedures flowed from the agency's conclusion that the transfer was a "detail" rather than a permanent reassignment and thus was not a major adverse action as defined by the statute. Pet. App. 64a. While petitioner's supervisors may have erred in the conclusion, as the district court

ultimately held, such an error does not involve any recurring issue of law on which petitioner seeks review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
MARLEIGH D. DOVER
MARK W. PENNAK
Attorneys

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